Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MARC M. HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a district court commits plain error by sentencing a criminal defendant with the understanding that the U.S. Sentencing Guidelines are mandatory rather than advisory, should the court of appeals:

A) Remand the case for re-sentencing (as is done in the Third Circuit, *United States v. Davis*, 407 F.3d 162 (3d Cir. 2005); the Fourth Circuit, *United States v. Hughes*, 396 F.3d 374 (4th Cir. 2005); the Sixth Circuit, *United States v. Oliver*, 397 F.3d 369 (6th Cir. 2005); and the Ninth Circuit, *United States v. Ameline*, 400 F.3d 646, 655 (9th Cir. 2005));

B) Grant a limited remand so the district court can indicate whether it would have sentenced differently under an advisory system and then resentence if appropriate (as is done in the Second Circuit, *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005); the Seventh Circuit, *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005); and the District of Columbia Circuit, *United States v. Coles*, 403 F.3d 764 (D.C. Cir. 2005)); or

C) Refuse to remand unless the defendant can show a reasonable probability that the district court would sentence differently under an advisory Guidelines system (as is done in the First Circuit, *United States v. Antonakopoulos*, 399 F.3d 68 (1st Cir. 2005); the Eleventh Circuit, *United States v. Pirani*, 406 F.3d 543 (8th Cir. 2005); *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. 2005); and the Tenth Circuit, *United States v. Gonzalez-Huerta*, 403 F.3d 727, 737 (10th Cir. 2005))?

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Appendix B — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition(s) For Rehearing And Petition(s) For Rehearing En Banc Filed February 13, 2006 .... 4a

Petitioner, Marc M. Harris, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case. Although the District Court imposed sentence in violation of Mr. Harris' Sixth Amendment rights, the Eleventh Circuit refused to vacate and remand for re-sentencing.

INTRODUCTION

Review in this Court is warranted because a three way circuit split exists with regard to the so called "pipeline cases" under *United States v. Booker*, 125 S. Ct. 738 (2005). This term refers to instances where an individual received his sentence prior to the *Booker* decision, but *Booker* was in place for the individual's direct appeal.

Every circuit holds that pipeline defendants are victims of clear error, but because of the circuits' varied approaches on subsequent issues, the district of prosecution regularly determines whether a pipeline defendant will have the opportunity to be re-sentenced or even have a review of his sentence. In four circuits, a pipeline defendant is virtually always entitled to a new sentencing hearing. Three circuits grant a pipeline defendant a limited remand. In these circuits, the district court reviews each case to determine whether a re-sentencing is necessary. Five circuits deny a remand unless the defendant can prove there is a reasonable probability that a different sentence will result.

Mr. Harris finds himself in the worst possible pipeline situation. In clear violation of *Booker*, the District Court used findings supported by the preponderance of the evidence to add 28 offense levels to his guideline calculation. These

additional levels caused his sentence to increase more than 16 years. Yet, because he was prosecuted in the Eleventh Circuit (which employs the most stringent standard for obtaining a remand), Mr. Harris is ineligible for re-sentencing or even limited review because he cannot prove the District Court likely would have sentenced him differently under *Booker's* standards.

Mr. Harris' situation is limited to a certain number of individuals, but this circuit conflict disrupts a major goal of the Sentencing Guidelines: achieving sentencing uniformity. Moreover, *Booker's* purpose was to eliminate Constitutional error from the federal sentencing process. In Mr. Harris' case, neither goal is achieved, and he is serving a sentence of extraordinary length.

OPINIONS AND ORDERS BELOW

The opinion in the Court of Appeals for the Eleventh Circuit is reported at 159 Fed. Appx. 107 (11th Cir. 2005). Mr. Harris sought rehearing and rehearing en banc. The denial of this petition is unreported. Both decisions appear in the Appendix at 1a and 4a.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on December 13, 2005 (App., *infra*, 1a). The Court denied Mr. Harris' petition for rehearing and petition for rehearing en banc on February 13, 2006 (App., *infra*, 4a). Accordingly, the Supreme Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT

A. The Charges And The Evidence.

On September 30, 2003, a grand jury in the Southern District of Florida returned a thirty count superseding indictment which charged Mr. Harris with one count of conspiracy to impede and impair the Internal Revenue Service in the ascertainment, computation, assessment, and collection of federal excise and income taxes in violation of 18 U.S.C. § 371 (Count 1); eight counts of attempted federal excise tax evasion in violation of 26 U.S.C. § 7201 and 18 U.S.C. § 2 (Counts 2 through 9); one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h) (Count 10); six counts of knowingly conducting transactions designed to conceal and disguise the nature, location, source, ownership, and control of proceeds from the smuggling of Freon gas into the United States in violation of 18 U.S.C. § 1956(a)(1)(B)(i) and 18 U.S.C. § 2 (Counts 11 though 16); six counts of money laundering in violation of 18 U.S.C. § 1957 and 18 U.S.C. § 2 (Counts 17 through 22); and eight counts of aiding and assisting in the preparation and presentation of false tax returns in violation of 26 U.S.C. § 7206(2) (Counts 23 through 30).

In November 2004, the District Court held a jury trial. The evidence indicated the following:

During the mid-1990's, Mr. Harris owned and operated a financial services business in Panama. This company advised its customers on asset protection and international finance, including how to create off-shore entities. The company also operated investment funds.